Supreme Court, U. S.
FILED
MAY 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1682

WILSON FREIGHT FORWARDING COMPANY,
a/k/a WILSON FREIGHT COMPANY,
Petitioner,

v.

GORDON BAUGHMAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD L. ROSENZWEIG,
Attorney for Petitioner,
1603 Law & Finance Building,
Pittsburgh, Pennsylvania 15219,
412-281-6504.

Of Counsel:
ARTHUR E. SIEGEL,
3636 Follett Avenue,
Cincinnati, Ohio 45223,
513-681-5600.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON, SENIOR REPRESENTATIVE
HAROLD L. BEREGSZEN, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7463

INDEX.

	Page
Opinions Delivered in the Courts Below	1
Statement of the Grounds on which the Jurisdiction of this Court is Invoked	2
Questions Presented for Review	2
Statute Involved	3
Statement of the Case	4
1. Nature of the Case	4
2. Evidence Presented in the District Court	6
3. Findings by the Court of Appeals As To Evidence Presented By Plaintiff	7
Basis For Federal Jurisdiction In The Court Of First Instance	8
Argument Amplifying Reasons Relied On For Allowance Of The Wirt	8
Conclusion	12
Appendix A—Opinions of the United States Court of Appeals for the Third Circuit	14
Appendix B—Opinion of the United States District Court for the Western District of Pennsylvania	27

TABLE OF CASES.

Cleary v. National Distillers and Chemical Corp., 505 F.2d 695 (9th Cir. 1974)	9
Dennis v. U.S., 302 F.2d 5 (10th Cir. 1962)	10
Flintkote Company v. Lysfjord, 246 F.2d 368 (9th Cir. 1957)	9, 11
Glasser v. United States, 315 U.S. 60, 62 S.Ct. 467, 86 L.Ed. 680 (1941)	8, 9, 11

	Page
Janis v. Wilson, 521 F.2d 724 (8th Cir. 1975)	10
Overseas Motors, Inc. v. Import Motors Ltd., Inc., 375 F.Supp. 495 (U.S.D.C. E.D. Mich. 1974, Aff'd 6th Cir. 1975, 519 F.2d 119, Cert. Den. U.S. S.Ct.)	9
South-East Coal Company v. Consolidation Coal Company, 434 F.2d 767 (6th Cir. 1970)	9
U.S. v. Apollo, 476 F.2d 156 (5th Cir. 1973)	10
U.S. v. Fiorito, 499 F.2d 109 (7th Cir. 1974)	10
U.S. v. Ledesma, 499 F.2d 36 (9th Cir. 1974)	10
U.S. v. Rodrigues, 491 F.2d 663 (3rd Cir. 1974)	10
U.S. v. Talbot, 470 F.2d 158 (5th Cir. 1972)	10
United States v. Calaway, 524 F.2d 609 (9th Cir. 1975)	10
United States v. Hopkins, 518 F.2d 152 (3rd Cir. 1975)	10
United States v. Mayes, 512 F.2d 637 (6th Cir. 1975)	10
United States v. Nixon, 418 U.S. 683, 95 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)	9
United States v. Olivia, 497 F.2d 130 (5th Cir. 1974)	10

STATUTE.

Sherman Anti-Trust Act, 15 U.S.C. ¶ 1, *et seq.* 3, 4, 8

MISCELLANEOUS.

31A C.J.S. ¶ 362..... 11

IN THE

Supreme Court of the United States

October Term 1975
No. .....

WILSON FREIGHT FORWARDING COMPANY,
a/k/a WILSON FREIGHT COMPANY,
Petitioner,

v.

GORDON BAUGHMAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Wilson Freight Forwarding Company, a/k/a Wilson Freight Company, hereinafter called the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the case of Gordon Baughman, Appellant v. Cooper Jarrett, Inc., Matlack, Inc., National Freight Lines, Wilson Freight Forwarding Company and Brauns Baking Company a/k/a Continental Baking Company, Inc., Appellee, No. 75-1536/37 on February 18, 1976.

Opinions Delivered in the Courts Below

The opinions of the United States Court of Appeals for the Third Circuit was filed February 18, 1976 and is not yet reported. The printed opinion of the Court is attached as Appendix A.

The opinion of the United States District Court for the Western District of Pennsylvania was filed on March 31, 1975 and is reported at 391 F. Supp. 671 (W.D. Pa. 1975). The reported Opinion is attached as Appendix B.

Statement of the Grounds on which the Jurisdiction of this Court is Invoked

The date of the judgment or decree sought to be reviewed is February 18, 1976. Such judgment remanded the case to the United States District Court for the Western District of Pennsylvania with the direction that it enter a judgment in the amount of $30,600.00. The judgment was transmitted to the district Court by letter of March 18, 1976 wherein it was noted on the judgment "certified as a true copy and issued in lieu of a formal mandate on March 18, 1976".

On March 10, 1976 the United States Court of Appeals for the Third Circuit entered an order wherein the petition of Wilson Freight Company for rehearing was denied.

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review the judgment or decree in question by writ of certiorari is 28 U.S.C. ¶ 1254(1).

Questions Presented for Review

Whether the decision the United States Court of Appeals for the Third Circuit is in conflict with the decisions of other Courts of Appeals and the United States Supreme Court on the sufficiency of proof required to establish an anti-trust conspiracy, specifically,

Whether a plaintiff may prove a conspiracy to boycott his services solely through alleged declarations of accused co-conspirators without any other independent evidence of the conspiracy?

Statute Involved

The statute involved is the Sherman Act, Paragraph 1, 15 USCS ¶ 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transaction, under any statute, law, or public policy applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914 [15 USCS § 45]: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producer, or between wholesalers, or be-

tween brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars, or by imprisonment not exceeding three years or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647 § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, § 3, 88 Stat. 1708.)

Statement of the Case

1. Nature of the Case

The nature of the case is a civil anti-trust action wherein plaintiff alleged an illegal conspiracy between the defendants to prevent him from obtaining employment as a truck driver. Plaintiff invoked Sections 1 and 2 of the Sherman Act, 15 U.S.C. ¶ 1 *et seq.*

The case went to trial on January 10, 1974, and resulted in a jury verdict for plaintiff Baughman. By Order of August 20, 1974, a new trial was granted.

A second jury trial was held on October 10, 1974 through October 21, 1974 against defendants Cooper-Jarrett, Matlack, and the petitioner herein Wilson Freight Company. Cooper-Jarrett and Matlack settled with plaintiff after the trial commenced. The trial concluded on October 21, 1974 with a jury verdict against Wilson in the amount of $25,000. The District Court trebled this to $75,000.

Wilson filed two (2) post trial motions for reduction of judgment upon credit for payment by co-defendants, and a motion for judgment notwithstanding the verdict.

The District Court denied Wilson's Motion for Judgment *N.O.V.*, and granted in part and denied in part Wilson's Motion for Reduction of Judgment. The District Court entered a final judgment against Wilson in the amount of $25,200.

Wilson filed a Notice of Appeal to the Third Circuit Court of Appeals appealing the order of March 31, 1974 denying Wilson's Motion for Judgment *N.O.V.* and denying in part Wilson's Motion for Reduction of Judgment. Plaintiff filed a cross appeal.

The Court of Appeals for the Third Circuit filed an Opinion and judgment on February 18, 1976 which affirmed the denial of the Motion for Judgment *N.O.V.* and modified the District Court's judgment by increasing it to $30,600.

The basis for Wilson's Motion for Judgment *N.O.V.* and appeal from the denial thereof to the Court of Appeals for the Third Circuit was the insufficiency of proof put forth by plaintiff to establish an anti-trust conspiracy. Wilson contended that plaintiff attempted to prove a conspiracy to boycott his services solely through alleged declarations of accused co-conspirators without any other independent evidence of the conspiracy.

The Court of Appeals for the Third Circuit rejected this contention and affirmed the denial of Wilson's Motion for Judgment *N.O.V.*

The only question presented for review in this Petition for Certiorari is with respect to the Court of Appeals failure to enter a judgment notwithstanding the verdict for Wilson because of the insufficiency of proof required to establish an anti-trust conspiracy.

2. Evidence Presented in the District Court

Plaintiff introduced testimony concerning an alleged declaration of Matlack terminal manager Randy Clark that "the word was out from Cooper-Jarrett that he had better not hire him because he would just probably make trouble here at the terminal." (140, 250).* Such testimony did not mention Wilson. Wilson objected prior to the testimony on the basis that there was no threshold evidence of a conspiracy, but the testimony was permitted over objection.

Plaintiff testified to a declaration allegedly made by Cooper-Jarrett Vice President on the day plaintiff was fired from Cooper-Jarrett, October 23, 1970. The alleged declaration of Mr. Frankel was "he will not drive any of Cooper-Jarrett's trucks ever again nor will he drive for any other freight company." (233-234).

Wilson moved to strike this testimony on the ground that it was not made in the furtherance of any conspiracy, and not admissible unless there is independent threshold evidence that a conspiracy was in effect. The District Court permitted the testimony (236-240).

Plaintiff was permitted to testify over the same objection of Wilson that there was no threshold evidence of a conspiracy concerning an alleged declaration of Wilson employee Claire Umberger. The alleged declaration of Umberger was "He said at that time that he was sorry he could not use me. He said the word was out from Cooper-Jarrett that I was blacklisted, that he could not hire me." (263-264).

---

* Numbers in parenthesis represent references to the record in the District Court in the trial commencing October 10, 1974.

The time between the alleged Frankel statement on October 23, 1970 and the alleged Umberger statement in early September 1971 was approximately ten (10) months.

This was the only evidence which plaintiff produced in support of his allegation of a conspiracy to boycott his services involving Wilson.

3. Findings by the Court of Appeals As To Evidence Presented By Plaintiff.

The Court of Appeals acknowledged that the only evidence of a blacklisting conspiracy was the alleged statement of alleged co-conspirators. At page 17 of the Opinion of the Court of Appeals attached as Appendix A, it stated: "The only evidence tending to connect Wilson to the blacklisting conspiracy was the testimony of Baughman respecting a Wilson employee named Umberger."

The Court of Appeals further stated at page 19 of the Opinion attached as Appendix A: "But the record contains other evidence of the existence of a conspiracy, and of the participation of Matlack and Wilson. That evidence included the statements made by Umberger, referred to above, and statements made by Matlack terminal manager." The alleged statement of the Matlack Terminal Manager did not mention Wilson.

The Court of Appeals acknowledges that this is the only evidence of a conspiracy, and excludes the alleged statement of Cooper-Jarrett Vice President Frankel at page 19 of the Opinion attached as Appendix A as being "hardly reliable evidence of the conduct of third parties whose participation would be required to make Frankel's expressed state of mind anything more than a hope."

Basis For Federal Jurisdiction In The Court Of First Instance.

The basis for federal jurisdiction in the Court of first instance was the allegations by plaintiff that a cause of action was stated under Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. ¶ 1 *et seq.*

Argument Amplifying Reasons Relied On For Allowance Of The Writ.

The decision of the Court of Appeals for the Third Circuit is in conflict with the decisions of other Courts of Appeals and the United States Supreme Court on the sufficiency of proof required to establish an anti-trust conspiracy. The Third Circuit Court of Appeals held in this case that a plaintiff may prove an anti-trust conspiracy to blacklist his services solely through testimony as to alleged statements made by alleged co-conspirators, without any other independent evidence of the conspiracy.

The Court of Appeals for the Third Circuit has sanctioned a departure by a lower court from the usual and accepted standards of proof required in an anti-trust conspiracy action so as to call for an exercise of this Court's power of supervision.

The matter of proof of an anti-trust conspiracy arising under the Sherman Act is a federal question. The Court of Appeals for the Third Circuit has decided such federal question in a way in conflict with applicable decisions of this Court.

The principle has been firmly established since this Court's decision in *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 467, 86 L.Ed. 680 (1941) that alleged declarations of alleged co-conspirators are admissible only if there is

proof aliunde that he is connected with the conspiracy. This principle has been applied repeatedly in anti-trust conspiracy cases requiring that plaintiffs establish the prior existence of the conspiracy, who were its supposed members, how they supposedly operated, what their conspiratorial purpose was, and how they brought about their alleged purposes, and defendants connection with the conspiracy *before* evidence of the acts or statements of alleged co-conspirators would be admissible. *Flintkote Company v. Lysfjord*, 246 F.2d 368, 377, 386-387 (9th Cir. 1957).

The Court of Appeals for the Third Circuit recognized this principle at pages 17 and 19 of the Opinion attached as Appendix A wherein it cited *Glasser v. United States, supra.* The Court of Appeals for the Third Circuit failed to properly apply these decisions to the present facts which it found in this case.

The United States Supreme Court has recently reaffirmed this principle in *United States v. Nixon*, 418 U.S. 683, 95 S. Ct. 3090, 41 L.Ed.2d 1039 (1974), particularly at 94 S.Ct. at 3104, Footnote 14. Footnote 14 states that as a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury, and cites cases of the United States Supreme Court and of other Circuit Courts of Appeals.

The principle has been followed by the following Circuit Courts of Appeals in anti-trust cases: *Cleary v. National Distillers and Chemical Corp.*, 505 F.2d 695, 697 (9th Cir. 1974); *Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F.Supp. 495, 538 (U.S.D.C. E.D. Mich. 1974, Aff'd 6th Cir. 1975, 519 F.2d 119, Cert. Den. U.S. S. Ct.); *South-East Coal Company v. Consolidation Coal Company*, 434 F.2d 767, 788 (6th Cir. 1970).

The Court of Appeals for the Third Circuit has repudiated its own holding in the recent case of *United States v. Hopkins*, 518 F.2d 152, 156 (3rd Cir. 1975) wherein it specifically stated at page 156 that a hearsay declaration of an alleged co-conspirator cannot serve as independent evidence of participation in the conspiracy.

The Third Circuit Court of Appeals has also diverged from its recent opinion in *U.S. v. Rodrigues*, 491 F.2d 663, 665, 667 (3rd Cir. 1974).

The principle which the Third Circuit Court of Appeals failed to follow in this case has been recently reaffirmed by other Circuit Courts of Appeals in the following cases: *United States v. Mayes*, 512 F.2d 637, 651 (6th Cir. 1975); *Janis v. Wilson*, 521 F.2d 724, 733 (8th Cir. 1975); *United States v. Olivia*, 497 F.2d 130, 132 (5th Cir. 1974); *United States v. Calaway*, 524 F.2d 609, 612 (9th Cir. 1975); *U.S. v. Talbot*, 470 F.2d 158, 159 (5th Cir. 1972); *U.S. v. Apollo*, 476 F.2d 156, 159 (5th Cir. 1973); *U.S. v. Ledesma*, 499 F.2d 36, 40 (9th Cir. 1974); *U.S. v. Fiorito*, 499 F.2d 109 (7th Cir. 1974); and *Dennis v. U.S.*, 302 F.2d 5, 10 (10th Cir. 1962).

As acknowledged at Page 4 of the opinion of the Court of Appeals, the only evidence to connect Wilson to the blacklisting conspiracy was the testimony of the plaintiff Baughman respecting an alleged statement of an employee of Wilson. The alleged statements of employees of Matlack and Cooper-Jarrett failed to mention Wilson.

The Court of Appeals holds that participation in a conspiracy can be proved against a defendant solely by the introduction of an alleged statement of an agent of the defendant. The Court of Appeals holds that such alleged declaration of an agent of defendant Wilson is not only the threshold evidence or evidence aliunde of a conspiracy involving defendant and others, but then, contrary to *Glasser v. United States*, lifts itself by its bootstraps to become the only evidence connecting Wilson with Cooper-Jarrett.

The Court of Appeals fails to recognize the underlying principle governing the admission of statements against other co-conspirators as being an agency relationship. Once there is proof aliunde of a conspiracy, then the co-conspirators become agents of each other and can bind each other by their statements. Such alleged statements cannot provide this independent evidence necessary to create an agency relationship which is a prerequisite to the admissibility of such statements.

The Court of Appeals has created a new rule permitting an accusing plaintiff to establish a conspiracy among and between defendants solely by his own testimony as to alleged declarations of agents of the accused co-conspirators. The rationale for rejecting this was aptly put by the Ninth Circuit in *Flintkote Company v. Lysfjord*, 246 F.2d 368, 387:

> "The only conceivable basis upon which the admission of such unsworn and damaging evidence can be justified—the parties acted in concert and each authorized or approved the other's actions—intrinsically necessitates an independent showing of the conspiracy. If the rule were otherwise, persons would go to jail or be held liable for damages solely on hearsay evidence which they had no opportunity to impeach or refute."

The Court of Appeals has gone completely contrary to the established law of this Court and other Courts of Appeals as has been stated and repeatedly cited in 31A C.J.S. ¶ 362:

> "Conspiracy must be proved by independent evidence, and declarations of one of the persons alleged

to be engaged in the common design are not admissible to prove its existence, but may be received in corroboration if sufficient evidence is produced aliunde."

The Court of Appeals for the Third Circuit has specifically acknowledged in its opinion that the conspiracy between Wilson and Cooper-Jarrett was shown only by an alleged declaration of an agent of Wilson. There was no evidence aliunde of such a conspiracy. The only other evidence was alleged declarations of agents of the other alleged co-conspirators, none of which mentioned of in any way implicated Wilson.

The District Court in its opinion acknowledged the requirement that there be independent evidence of a conspiracy at Page 41 of 395 F. Supp., Appendix B to this petition. Like the Court of Appeals the District Court held that the alleged declarations of co-conspirators could both provide the evidence aliunde of a conspiracy and then become admissible under the co-conspirator exception.

The specific sanction of this new rule of law by the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to require the intervention of this Court's supervisory powers.

Conclusion

The decision of the United States Court of Appeals for the Third Circuit is in conflict with the decisions of other Courts of Appeals and the United States Supreme Court on the sufficiency of proof required to establish an anti-trust conspiracy. The Court of Appeals has specifically sanctioned a departure from the established rule that an anti-trust conspiracy cannot be proven solely through

alleged declarations of accused co-conspirators without any other independent evidence of the conspiracy. The Writ of Certiorari should be granted because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision. The decision of the Court of Appeals is in direct conflict with decisions of many other Courts of Appeals and of this Court on the matter of proof of an anti-trust conspiracy.

Respectfully submitted,

RICHARD L. ROSENZWEIG,
Attorney for Petitioner,

1603 Law & Finance Building,
Pittsburgh, Pennsylvania 15219.

Of Counsel:

ARTHUR E. SIEGEL,
3636 Follet Avenue,
Cincinnati, Ohio 45223.

APPENDIX A.

Opinions of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1536 & 75-1537

GORDON BAUGHMAN,

v.

COOPER-JARRETT, INC., MATLACK, INC., NATIONAL FREIGHT LINES, WILSON FREIGHT FORWARDING COMPANY and BRAUNS BAKING COMPANY a/k/a CONTINENTAL BAKING COMPANY, INC.

GORDON BAUGHMAN, Appellant in No. 75-1536

WILSON FREIGHT FORWARDING COMPANY a/k/a WILSON FREIGHT COMPANY, Appellant in No. 75-1537

(D.C. Civil Action No. 72-466)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued December 10, 1975

Before SEITZ, *Chief Judge*, GIBBONS and ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed February 18, 1976)

John W. McIlvaine, Esq.
223 Second Street
Monongahela, Pennsylvania 15063
Attorney for Gordon Baughman

Richard L. Rosenzweig, Esq.
Rosenzweig & Rosenzweig
1603 Law & Finance Building
Pittsburgh, Pennsylvania 15219
Arthur E. Siegel, Esq.
3636 Follett Avenue
Cincinnati, Ohio 45223
Attorneys for Wilson Freight Company

GIBBONS, *Circuit Judge*

In these cross appeals the plaintiff Gordon Baughman, appellant in No. 75-1536, contends that the district court erred in reducing a judgment in his favor from $75,000 to $25,200, while the defendant, Wilson Freight Forwarding Company (Wilson), cross-appellant in No. 75-1537, contends that the district court erred in denying its motion for judgment n.o.v.[1] We remand for a modification of the judgment.

I. PROCEEDINGS BELOW

Baughman, an over-the-road truck driver, brought suit against his former employer, Cooper-Jarrett, Inc., and four other trucking companies including Wilson, charging that the defendants conspired to blacklist him from obtaining work in the trucking industry. Relief was predicated on the Sherman Act § 1 and § 2, 15 U.S.C. §§ 1, 2, and on a pendent Pennsylvania law claim for tortious interference with prospective contractual relationships. Trial of that action in January, 1974 resulted in a directed verdict in favor of all defendants on the Sherman Act § 2 claim, in

1. The district court's opinion is reported at 391 F. Supp. 671 (W.D. Pa. 1975).

favor of all defendants except Cooper-Jarrett on the pendent state law claim, and in favor of one defendant on all claims. The jury rendered a verdict against three of the remaining defendants on the Sherman Act § 1 claim and against Cooper-Jarrett on the pendent state law claim. It absolved one defendant of all liability. On the defendants' motion for judgment n.o.v. and for a new trial, the court granted a new trial.

The second trial commenced on October 9, 1974, against the three remaining defendants. After the jury was sworn but prior to plaintiff's opening statement two of the defendants, Cooper-Jarrett and Matlack, Inc., entered into a settlement agreement whereby they paid Baughman a total of $60,000 in compromise of the Sherman Act § 1 claim in return for a joint tortfeasor release. Baughman reserved all his rights against Wilson. The case went to trial against Wilson and the jury returned a verdict of $25,000 in Baughman's favor. Trebled pursuant to 15 U.S.C. § 15, the resulting judgment was $75,000.

Wilson moved for judgment n.o.v., and alternatively to reduce the judgment by crediting against it the $60,000 obtained in settlement from Cooper-Jarrett and Matlack. The court denied the motion for judgment n.o.v., but reduced the judgment to $25,200.[2]

II. Wilson's Liability Contentions

Wilson makes two arguments in support of its contention that it is entitled to a judgment n.o.v. The first is that the court in a pre-trial ruling erred in failing to grant its motion for summary judgment because Baughman at that time produced no evidence suggesting a factual dispute

2. The order appealed from left undetermined the amount of an award of attorney's fees recoverable pursuant to 15 U.S.C. § 15. That statute provides for the recovery by the prevailing litigant of "threefold the damages sustained by him, and the *cost of suit, including a reasonable attorney's fee.*" (emphasis supplied). The award of such a fee as a part of the cost of suit is mandatory. 6 J. Moore, Federal Practice ¶ 54.71[2], at 1380 (2d ed. 1975). The reservation of the determination of costs does not affect the finality of the judgment for purposes of 28 U.S.C. § 1291.

over whether Wilson was a member of the conspiracy against him. This argument need not detain us. Wilson refers us to no authority for the proposition that an appellate court will after a jury trial and a verdict review an interlocutory order refusing to grant a motion for summary judgment. No reason in logic or policy suggests that we should do so. Indeed, the seventh amendment might impose an obstacle where, as here, there is sufficient evidence in the record for the case to have gone to the jury.

The second argument is that there is no properly admitted evidence showing that Wilson was a participant in the conspiracy to blacklist Baughman and no properly admitted evidence of the conspiracy.

The only evidence tending to connect Wilson to the blacklisting conspiracy was the testimony of Baughman respecting a Wilson employee named Umberger. If his testimony was either improperly admitted or insufficient, then the remaining evidence, consisting for the most part of admissions of alleged co-conspirators, was not admissible against Wilson. *Glasser v. United States,* 315 U.S. 60 (1941).

Umberger was the Relay Supervisor or Local Manager of Wilson's Stanton freight terminal. Although employment applications were forwarded to Wilson's headquarters in Cincinnati before a hiring decision was made, Umberger screened out the majority of applications and communicated to applicants the hiring decision and the reasons therefor. Baughman testified over objection (42a):

> Q. Go ahead. Tell the jury what Mr. Umberger, the terminal manager, told you and Mr. Fait about your application.
>
> A. He said at that time that he was sorry he could not use me. He said the word was out from Cooper Jarrett that I was blacklisted, that he could not hire me.

Baughman had previously applied for a job with Wilson, and was asked to check back in ten days. The quoted testimony referred to a conversation which took place when he did so. If Umberger could make admissions on behalf of Wilson, the conversation is evidence that Wilson was acting in concert with the other alleged conspirators in enforcing a blacklist.

Wilson urges that Umberger had no authority to make such an admission on its behalf. Whether an employee has the authority of an agent to make admissions on behalf of his employer is determined by the law of agency. *See* Fed. R. Evid. 801(a)(2)(C) and Notes of Advisory Committee; IV J. Wigmore, Evidence § 1078, at 162 (Chadbourn ed. 1972); *see generally Joseph T. Ryerson & Son, Inc. v. H. A. Crane & Brother, Inc.*, 417 F.2d 1263 (3d Cir. 1969). The district court found as a fact that Umberger had express or at least implied authority to inform Baughman of the reasons why Wilson had rejected his application for employment. Thus giving as a reason the existence of the blacklist is a statement concerning the subject matter about which Umberger was authorized to speak. *See* Restatement (Second) of Agency § 286 (1958); *Dudding v. Thorpe*, 47 F.R.D. 565, 571 (W.D. Pa. 1969). We conclude that Baughman's testimony about Umberger's statement was properly admitted, and thus that there was evidence of Wilson's participation in the blacklisting conspiracy sufficient to permit use against it of the admissions of co-conspirators made in furtherance of the conspiracy.

Wilson urges that even if there was evidence connecting it with the conspiracy the court erred in admitting over objection evidence of a statement by Clarence Frankel, a Cooper-Jarrett Vice President (32a):

> "He [Baughman] will not drive any of Cooper-Jarrett's trucks ever again nor will he drive for any other freight company."

The district court ruled that the statement fell within the state of mind exception to the hearsay rule. *See* Fed. R. Evid. 803(3); *Mutual Life Insurance Co. v. Hillmon*, 154 U.S. 285 (1892). Wilson concedes that the statement was admissible to show Frankel's then state of mind, but urges that it was error to permit use of the statement as evidence of its participation in the conspiracy. Evidence that Frankel intended never to let Baughman drive for Cooper-Jarrett is only slightly probative, if at all, of the conspiracy question. Evidence that he intended to preclude Baughman from driving for others, however, while probative of Frankel's state of mind, is hardly reliable evidence of the conduct of third parties whose participation would be required to make Frankel's expressed state of mind anything more than a hope. *See* Maguire, *The Hillmon Case, Thirty-Three Years After*, 38 Harv. L. Rev. 709, 717 (1925).

But the record contains other evidence of the existence of a conspiracy, and of the participation in it of Matlack and Wilson. That evidence included the statements made by Umberger, referred to above, and statements made by Matlack's terminal manager. Certainly Frankel's statement was admissible to show that Cooper-Jarrett intended to enlist the cooperation of others. The preferred course would have been to give a limiting instruction that Frankel's statement was not admissible to show the participation of Wilson or Matlack in the conspiracy. *Cf. United States v. Brown*, 490 F.2d 758, 762 n.7 (D.C. Cir. 1973). But since the evidence was admissible and against Wilson as proof of conspiracy merely cumulative, failure to give a limiting instruction was harmless error.[3]

We conclude that there is no basis for setting aside the jury's liability determination against Wilson.

III. The Reduction of the Judgment

Baughman does not dispute the rule that a plaintiff who has recovered an item of damage from one co-con-

3. The ruling admitting Frankel's statement without a limiting instruction would at most be a ground for a new trial, not for a judgment notwithstanding the verdict. No motion for a new trial was made in the district court. We may, however consider the issue. Rule 50(d), Fed. R. Civ. P.

spirator may not again recover the same item of damage from another conspirator. *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 348 (1971). Nor does either Baughman or Wilson dispute that the set-off is made against the trebled damage award, not merely against the compensatory amount determined by the jury. *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397-98 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). Both sides, however, contend that the district court erred in computing the amount of the set-off. Wilson urges that $60,000 should have been deducted from $75,000 and judgment entered for $15,000 at most. Baughman argues that the set-off of $49,800 which the district court allowed was too high. This disagreement arises out of a trial ruling to which no objection was made.

At the second trial the court at Wilson's request, and without objection from Baughman, instructed the jury to award damages only for the period after which Wilson joined the conspiracy.[4] There was evidence that a conspiracy existed as early as February, 1971, but there was no proof of participation by Wilson prior to August 24, 1971. The district court concluded that the jury's determination of damages in the amount of $25,000 covered damages for conspiratorial conduct after August 24, 1971, whereas the settlement by Cooper-Jarrett and Matlack covered damages for the period from February, 1971 forward. The court reasoned that the *Zenith* rule would not require a deduction for that part of the settlement attributable to damages which occurred prior to August 24, 1971. This required the court to attempt to reconstruct

4. The district court in considering the post trial motions assumed this instruction was error. 391 F. Supp. at 679. Baughman concedes that since he made no objection he cannot rely on the claimed error on appeal. Rule 51, Fed. R. Civ. P. In criminal cases this circuit has held that a co-conspirator is liable for all conspiratorial acts, even those committed prior to his joining the conspiracy. *See* United States v. Lester, 282 F.2d 750 (3d Cir. 1960), *cert. denied*, 364 U.S. 937 (1961); Lefco v. United States, 74 F.2d 66 (3d Cir. 1934). We have no occasion to consider in this case whether the same rule applies in civil cases. *But see* Essaness Theatres Corp. v. Balaban & Katz Corp., 1955 Trade Cas. ¶ 68,152 (N.D. Ill. 1955).

the total amount of damages suffered as a result of the conspiracy. There was evidence in the record to establish Baughman's loss of earnings for the entire life of the conspiracy, dating back to February, 1971. The court calculated a net earnings loss for the period from February, 1971 to August 24, 1971 of $5,200 and added that amount to the jury award of $25,000, to arrive at total damage of $30,200. Since about 83 per cent of the total damages was incurred after August 24, 1971, the court concluded that only 83 per cent of the $60,000 settlement, or $49,800, should be attributed to that damage period. It therefore deducted $49,800 from the $75,000 judgment, which yielded a net of $25,200.

The amount of credit to be applied against the judgment to reflect the proceeds of the settlement was a matter for the trial court to decide in the first instance. The court's findings of fact that $5,200 in damages was incurred prior to August 24, 1971 is not clearly erroneous. The jury verdict establishes the damages for the later period. Thus we must accept that the total of damages is $30,200. The only open question is what calculations should be made in arriving at the proper *Zenith* credit against the $75,000 judgment.

The theory on which the court in *Flintkote Co. v. Lysfjord, supra*, held that the credit for the payment from the settling conspirators should be applied to the trebled damage award rather than to the compensatory award prior to trebling was that all co-conspirators were liable for all elements of damage including the punitive damage resulting from trebling, and that the settlement payments must therefore be credited against all elements of damage included in the judgment. The district court purported to apply the *Flintkote* rule, but erred in one particular. It is true that the settling conspirators paid in compromise of their entire liability, including liability for the period from February, 1971 to August 24, 1971. But they were exposed to liability not only for single damages for that period, but

for treble damages. Their payment discharged that total liability, not merely their potential liability for $5,200 in compensatory damages. Compliance with the *Flintkote* theory requires the following calculation:

Pre-August 24, 1971 damages, trebled	$15,600
Post-August 24, 1971 damages, trebled	$75,000
Total damages	$90,600
Credit	$60,000
Net uncompensated damages, trebled	$30,600

By not taking into account the settling conspirators' potential liability for treble damages for the pre-August 24, 1971 wage losses, the district court allowed too great a credit against the $75,000 judgment. Judgment should have been entered for $30,600, representing the difference between the trebled verdict and the pro rata share of the settlement fund.

We have some difficulty with either the district court's approach or our own, because while we can say with some confidence that the district court's calculation of $5,200 is not clearly erroneous, it is not at all certain that the court's calculation and the jury's verdict were arrived at by comparable methods.[5] Nevertheless, the *Flintkote* rule that the settling defendants settled their treble damage liability seems to us sound. Because the court in its charge to the jury divided the damage periods, some means of apportioning the settlement between the two periods must, in the absence of any agreement, be devised. That which we have set out seems as fair as the circumstances in this record permit.

5. It is conceivable, for example, that although the court instructed the jury to award damages only for injuries sustained from August 24, 1971 forward, the jury in fact included part of all damages the court subsequently attributed to pre-August 24, 1971 activity. Any such suggestion is purely speculative, however, so it must be assumed that the jury acted consistent with its instructions.

Wilson argues that by apportioning any part of the settlement to pre-August 24, 1971 liability the court is permitting Baughman to go behind the jury verdict fixing his total damages at $75,000, and in effect to increase the verdict to over $90,000. It urges that Baughman should not, by having the court manipulate the amount of the credit, overcome his failure to object to the court's charge that Wilson was liable only for damages incurred after it joined the conspiracy. But Wilson was at least equally responsible for that erroneous charge. Indeed, it was given at its request. If the charge is a correct statement of the law (a matter on which we do not rule) then the court certainly was required to attribute some part of the settlement to the earlier period. If it is an incorrect statement of the law Wilson is in no better position than Baughman to complain about the court's effort to enter a judgment which avoids duplicate recoveries, but permits recovery of all that the jury found to be due.

IV. Conclusion

The order denying Wilson's motion for judgment notwithstanding the verdict will be affirmed. The order reducing the judgment from $75,000 to $25,200 will be vacated and the cause remanded to the district court with directions to enter a judgment in the amount of $30,600.

Rosenn, *Circuit Judge,* Concurring and Dissenting

I agree with the views expressed in Parts I and II of the majority's opinion. I am constrained, however, to dissent from its views as to the reduction of judgment as set forth in Part III. Since I believe the district court correctly determined the amount to be set off against the treble damage award, I would affirm the judgment of the district court in all respects.

The district court directed the jury to compute damages from August 24, 1971, the date that the defendant Wilson joined the conspiracy, rather than from its inception. The district court appropriately trebled the compensatory verdict of the jury as returned, $25,000, and reached the sum of $75,000.

The question then before the district court was the credit to be allowed under *Flintkote v. Lysfjord,* 246 F.2d 368 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957), for the settlement entered into between the plaintiff and Cooper-Jarrett and Matlack, Inc. Since the $60,000 settlement covered the entire period of the conspiracy, the district court properly determined that only 83 percent of this sum, or $49,800, should be attributed to the post-August 24, 1971, damage period presumably considered by the jury.[1] In view of the district court's instructions to the jury, this allocation was proper and was not inconsistent with the *Flintkote* principle. The net realized and the sum for which it entered judgment was $25,200. I believe the principle applied and its mathematical computation was correct.

Baughman contends that Wilson's liability as a co-conspirator should extend to the beginning of the conspiracy and should not have been confined by the district court's charge to the period after August 24, 1971. As he and the majority recognize, however, Baughman's failure to object to the instruction precludes him from raising the alleged error on appeal under Fed. R. Civ. P. 51. *Hoffman v. Sterling Drug, Inc.,* 485 F.2d 132, 138-39 (3d Cir. 1973). Hence, the majority states that it does not reach the issue of whether Wilson's liability should properly include the period prior to August 24, 1971. "The only

1. The district court reached its 83 percent figure by using pre- and post-August 24, 1971, figures untrebled. The majority claims this calculation fails to reflect defendants' liability for treble damages over the entire period. The identical result is reached, however, if all the figures are trebled. The trebled post-August 24, 1971, damages are $75,000 and are 83 percent of the total trebled damages of $90,600. It is that percentage which should be used, and was used by the district court, to apportion the settlement amount over the two periods under consideration.

open question," according to the majority, "is what calculations should be made in arriving at the proper *Zenith* credit against the $75,000 judgment."

Having thus disavowed any intention of considering Wilson's liability beyond the period referred to in the district court's charge, the majority then proceeds to remold the jury verdict to include, in effect, pre-August 24, 1971, damages. It deducts the entire settlement amount of $60,000 from the total potential trebled damages of $90,600 and awards Baughman the difference, thus allowing him all of his damages prior to August 24, 1971, despite the unchallenged instruction limiting damages to the period subsequent to that date.

Such a remolding of the verdict carries implications for the seventh amendment right to trial by jury. The United States Supreme Court has held that the proper remedy for an inadequate verdict is the grant of a new trial rather than the assessment of additional damages. Although a federal court may substitute a remission of the excess for a new trial where a verdict is too large, it cannot enlarge damages in the same way.

> [T]he remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935). The Court concluded that federal courts have no power to so invade the right to a jury determination of the extent of a defendant's liability.

In the instant case, the majority has ignored established principles by disturbing a judgment entered on the verdict of a jury supported by sufficient evidence, in spite of the absence of objection to the charge. *Hoffman, supra; Moomey v. Massey Ferguson, Inc.,* 429 F.2d 1184, 1187

Appendix A—Opinions of the United States Court of Appeals for the Third Circuit.

(10th Cir. 1970); *Manning v. New York Telephone Co.*, 388 F.2d 910, 912 (2d Cir. 1968); *Green v. American Tobacco Co.*, 325 F.2d 673, 676 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964). There is here no fundamental error requiring an exception to the general rule.

I would affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Opinion of the United States District Court for the Western District of Pennsylvania

Gordon Baughman
v.
Cooper-Jarrett, Inc., *et al.*
Civ. A. No. 72-466.

United States District Court,
W.D. Pennsylvania.

March 31, 1975.

Over-the-road truck driver brought civil antitrust action against trucking companies, alleging that they had engaged in a conspiracy in restraint of trade to blacklist him from obtaining work. Prior to trial, two defendants settled the case against them for a total payment of $60,000. The jury returned a verdict of $25,000 against the remaining defendant, and the court ordered that judgment be entered against that defendant for $75,000, after trebling under the Clayton Act. The defendant moved for judgment *n.o.v.* and also moved for a reduction of the judgment. The District Court, Knox, J., held that (1) competent evidence, admissible under exceptions to the hearsay rule, was introduced to show that defendant engaged in a conspiracy to blacklist plaintiff, and (2) since the jury's verdict was based only on damages incurred after August 24, 1971, the date defendant allegedly joined the conspiracy, whereas the settlement amount covered damages suffered both before and after that date, defendant was entitled to a deduction of only that portion of the settlement which covered damages after August 24, 1971, which to the instant case amounted to $49,800.

Motion for judgment *n.o.v.* denied; motion for reduction of judgment granted in part.

1. Evidence—269(1)

A person's declaration of intent to perform an act is admissible as tending to show that the act was in fact carried out as planned.

2. Evidence—121(2)

In civil antitrust action brought against trucking company by over-the-road truck driver who alleged that defendant and other trucking companies had engaged in conspiracy in restraint of trade to blacklist him from obtaining work, a statement allegedly made by vice-president of plaintiff's former employer to the effect that plaintiff would never drive for any other freight company was relevant and admissible, over hearsay objection, to prove that plaintiff's former employer contacted the defendant and other trucking companies in an effort to blacklist plaintiff. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. Evidence—121(2)

In civil antitrust action brought against trucking company by over-the-road driver who alleged that defendant and other trucking companies had engaged in a conspiracy in restraint of trade to blacklist him from obtaining work, statement by defendant's local terminal manager to the effect that plaintiff was blacklisted and that he, the manager, could not hire plaintiff was admissible, over hearsay objection, as a statement made within the scope of the manager's authority.

4. Conspiracy—19

Trial court has broad discretion in the admission of evidence which tends to establish a conspiracy, and the order of proof may be governed by the "rule of convenience."

5. Evidence—253(1)

In civil antitrust action brought against trucking company by over-the-road driver who alleged that defendant and other trucking companies had engaged in a conspiracy in restraint of trade to blacklist him, conspiratorial statements made by vice-president of plaintiff's former employer and by defendant's local manager, which were admissible under other exceptions to the hearsay rule, provided sufficient proof aliunde that a conspiracy existed to render admissible, under the coconspirator exception to the hearsay rule, a statement by manager of a co-defendant to the effect that "the word was out" from plaintiff's former employer that plaintiff would make trouble and should not be hired. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

6. Compromise and Settlement—4

In civil antitrust action brought against trucking companies by driver who alleged a conspiracy in restraint of trade to blacklist him, company which failed to settle and against which a judgment was subsequently returned by the jury was entitled to a defense of payment to the extent that the settlement by the codefendants covered items of damages included in the judgment.

7. Contribution—5(6)

Sherman Act contains no provisions by which Congress has legislated an exception to the common law rule of no right to contribution for intentional torts.

8. Conspiracy—13

One who joins an on-going conspiracy is equally culpable with the original members and is responsible for all that has previously been done pursuant to the conspiracy.

9. Conspiracy—1

A conspiracy requires two or more parties.

10. Damages—63

Since, in civil antitrust action brought against trucking company, the jury's verdict was based only on damages incurred after August 24, 1971, the date on which defendant joined the conspiracy to blacklist plaintiff, whereas the settlement amount recovered by plaintiff from other trucking companies covered damages suffered both before and after that date, defendant was entitled to a deduction of only that portion of the settlement which covered damages after August 24, 1971.

11. Monopolies—12(1.16)

A conspiracy in violation of the Sherman Act requires two or more parties who become jointly and severally liable for the resulting damages. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

12. Compromise and Settlement—4

An amount paid in settlement by one conspirator may provide a defense of payment for a coconspirator under the "Zenith" rule if it covers the same items of damages.

John W. McIlvaine, Washington, Pa., for plaintiff.

Richard L. Rosenzweig, Pittsburgh, Pa., for defendant, Wilson Freight Company.

OPINION AND ORDER

KNOX, District Judge.

Plaintiff Gordon Baughman, an over-the-road truck driver, originally brought this civil antitrust action against his former employer Cooper-Jarrett, Inc. and four other trucking companies alleging that the defendants engaged in a conspiracy in restraint of trade to blacklist him from obtaining work in the trucking industry. The complaint charged that the defendants violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1 *et seq.* and included a pendent state claim for tortious interference with prospective contractual relationships under Restatement, Torts § 766.

During the first trial of this action commencing on January 9, 1974, the court ruled that no cause of action had been made out under Section 2 of the Sherman Act and also determined that the pendent state claim, if it existed, could only be maintained against defendant Cooper-Jarrett, Inc. At the conclusion of the evidence, the court granted a directed verdict in favor of defendant Braun's Baking Company a/k/a Continental Baking Company, Inc. on the grounds that there was no evidence that this corporation engaged in interstate commerce and there was insufficient evidence to show that this defendant

participated in the alleged conspiracy to blacklist the plaintiff. As for the other defendants, the jury rendered a special verdict in which it found damages against Cooper-Jarrett, Inc., Matlack, Inc., and Wilson Freight Company for violation of Section 1 of the Sherman Act while absolving National Freight Lines of any liability. The jury further found damages against Cooper-Jarrett, Inc. for wrongfully inducing other trucking companies to refuse to hire the plaintiff as alleged in the pendent state claim.

Following entry of judgment on the verdict, defendants Cooper-Jarrett, Matlack, and Wilson filed Motions for Judgment *NOV* and for a New Trial. In an Opinion and Order of August 20, 1974, the court denied the Motions for Judgment *NOV*, but granted the Motions for a New Trial on the ground that the closing address of plaintiff's counsel to the jury was replete with prejudicial remarks.

In the second trial commencing on October 9, 1974, the plaintiff proceeded against defendants Cooper-Jarrett, Inc., Matlack, Inc., and Wilson Freight Company. After the jury was sworn, but prior to plaintiff's opening statement, the plaintiff entered into a settlement agreement with Cooper-Jarrett and Matlack whereby Cooper-Jarrett agreed to pay $37,500 and Matlack agreed to pay $22,500 or a total of $60,000 to the plaintiff in return for a joint tortfeasor release. Although the plaintiff withdrew with prejudice the pendent state claim, the agreement provided that the payment by Cooper-Jarrett was limited to settlement of the antitrust claim. The plaintiff expressly reserved all of his rights against Wilson Freight Company, the remaining defendant.

At the close of the evidence in the second trial, the court instructed the jury that if Wilson Freight Company were found to have joined a conspiracy to blacklist the plaintiff in violation of Section 1 of the Sherman Act, damages could be determined only from the date when Wilson joined the conspiracy. This instruction was given at the request of the defendant and agreed to by the plaintiff. The jury returned a verdict for the plaintiff in the amount of $25,000 actual damages and on October 21, 1974, the court ordered that judgment be entered against Wilson for $75,000 after trebling under 15 U.S.C. § 15. The court further ordered that the plaintiff was entitled to counsel fees, expenses, and costs to be determined at a later hearing.

Defendant Wilson Freight Company now presents this court with a Motion for Judgment *NOV* pursuant to Rule 50(b) of the Federal Rules of Civil Procedure asserting that there was no competent admissible evidence to show that Wilson engaged in a conspiracy to blacklist the plaintiff. Wilson also has filed a Motion for Reduction of Judgment claiming that the judgment should be reduced to $15,000 because Wilson is entitled to a credit for the $60,000 in settlement payments by its co-conspirators, Cooper-Jarrett, Inc. and Matlack, Inc. to be deducted from the $75,000.

A. Motion for Judgment NOV

Wilson Freight Company presents a Motion for Judgment *NOV* claiming that the court erred in admitting certain hearsay declarations and, therefore, there was no competent evidence showing that Wilson engaged in a con-

spiracy to blacklist the plaintiff. The statements in issue, related by plaintiff's witnesses during the trial, allegedly were made by Clarence Frankel of Cooper-Jarrett, Inc., Claire Umberger of Wilson and Randy Clark of Matlack, Inc. In considering this motion, the court must view the evidence in the light most favorable to the party who won the jury verdict—in this case the plaintiff. 5A J. Moore, Federal Practice § 50.07 at 2356-57. For the reasons stated below, the defendant's motion will be denied.

The plaintiff's contention in this case was that after firing the plaintiff, Cooper-Jarrett, Inc. enlisted other trucking companies in a common effort to prevent the man from obtaining further employment. The evidence produced at trial showed that the plaintiff was employed as an over-the-road truck driver by Cooper-Jarrett until he was fired on October 23, 1970. The plaintiff testified that when he was fired, Clarence Frankel, a Vice-President of Cooper-Jarrett, stated: "He [plaintiff] will not drive any of Cooper-Jarrett's trucks ever again nor will he drive for any other freight company." (Trans. No. 1 at page 17).

[1, 2] Wilson argues that this statement constitutes inadmissible hearsay which does not fall within the co-conspirator exception because it was made before any conspriacy could have begun. While we agree that there may not have been two or more conspirators involved at that point in time, Frankel's statement falls within another exception to the hearsay rule. A person's declaration of intent to perform an act is admissible as tending to show that the act was in fact carried out as

planned. *See* Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295-96, 12 S.Ct. 909, 36 L.Ed. 706, 710 (1892); Blackburn v. Aetna Freight Lines, Inc., 368 F.2d 345, 348 (3d Cir. 1966) (dictum); United States v. Annunziato, 293 F.2d 373, 377 (2d Cir.), *cert. denied*, 368 U.S. 919, 82 S.Ct. 240, 7 L.Ed.2d 134 (1961); Nuttall v. Reading Co., 235 F.2d 546, 551 (3d Cir. 1956); Commonwealth v. Santos, 275 Pa. 515, 119 A. 596, 599 (1923). Accordingly, we find that Frankel's statement was relevant and admissible to prove that Cooper-Jarrett thereafter contacted Wilson and other trucking companies in an effort to blacklist the plaintiff.

The defendant's second objection is to certain alleged statements by Claire Umberger who is the Relay Supervisor or local manager for Wilson Freight Company at the company's terminal in New Stanton, Pennsylvania. The evidence indicated that the plaintiff went to Wilson's New Stanton terminal and filed an application for employment on August 24, 1971. The plaintiff testified that when he returned about seven to ten days later to check on his application, Umberger stated: ". . . the word was out from Cooper-Jarrett that I [plaintiff] was blacklisted, that he [Umberger] could not hire me." (Trans. No. 1 at p. 35). This testimony was corroborated by Ross Fait who accompanied the plaintiff to the Wilson terminal.[1] The jury may well have inferred from this statement that Cooper-Jarrett had secured the cooperation of Wilson in its efforts to blacklist the plaintiff.

---

[1] Although Fait did not testify in person at the second trial, his testimony at the January 1974 trial was read into the record.

[3] The defendant argues that this declaration constitutes inadmissible hearsay because Umberger did not have actual authority to make a statement admissible against Wilson on the subject of a conspiracy. Wilson interprets the law too narrowly if it means to imply that the plaintiff must show that Umberger was expressly authorized to inform the plaintiff that he was the target of an illegal conspiracy. Conspiracies are secretive by their very nature, and such a requirement would unduly burden their innocent victims from obtaining relief. Considering all the facts presented, we find that Umberger's statement falls within the admission of a party exception to the hearsay rule because it was made within the scope of his authority.

In Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950), the Third Circuit stated that admissions made by an agent of a party are admissible when the agent's powers are broad enough to constitute him the general representative of the principal with broad managerial responsibilities *See also* Johnson v. Yost Lumber Co., 117 F.2d 53, 60 (8th Cir. 1941) (statements of local lumber yard managers held admissible against defendant lumber companies in action to recover damages under Sherman Act for conspiracy to boycott the plaintiff). Umberger appears to have such broad managerial responsibility because he was the head man at the New Stanton terminal. According to his own testimony, Umberger was charged with the management of all personnel at the New Stanton terminal and was responsible for overseeing the movement of freight inbound and out-

bound and for the preservation of property and equipment. (Trans. No. 1 at 212-13). Umberger was more than a mere subordinate in the company; he was Wilson's manager on the scene at the New Stanton locality.

The defendant claims that Umberger was only a middleman with respect to hiring and firing and refers to testimony by Umberger and James Mathias, Wilson's Vice President of Operations, that applications were forwarded to the company's home office in Cincinnati, Ohio where a final decision on hiring would be made. Even though the ultimate decision as to hiring may have been made in Cincinnati, Umberger still played a major role in that process. The undisputed evidence indicated that Umberger and his assistant, Roger Lewis, conducted a preliminary screening of all applications and retained all but those few which were forwarded to the home office. To the extent that certain applications were held at the New Stanton terminal, Umberger played a key role in denying those men employment.

Even though Umberger may not have had the ultimate authority to hire drivers, he appears to have had either express or implied authority to tell an applicant whether or not he was hired and the reasons why. He was the manager of the local terminal and dealt directly with the applicants. As stated by James Mathias, as far as the average man seeking a job at the New Stanton terminal was concerned, Umberger was the man in charge of hiring (Trans. No. 1 at p. 274). Considering all the circumstances, we conclude that Umberger's statement that "the word was out from Cooper-Jarrett" was made within the scope of his authority as Relay Supervisor or local manager at the New Stanton terminal.

Finally, Wilson objects to the introduction of certain alleged statements by Randy Clark, Manager of the Matlack Inc. terminal at Adamsburg, Pennsylvania. Tony Stanrajh, an over-the-road truck driver for Matlack, testified that after being fired from Cooper-Jarrett the plaintiff requested Stanrajh to speak with Clark about hiring the plaintiff. Stanrajh further testified that even though Matlack was hiring other people and even though Clark earlier had praised the plaintiff's driving ability, Clark told him: ". . . he [Clark] couldn't put him [plaintiff] on right now even if he was his own brother, and that, he says, anyway, the word was out from Cooper-Jarrett that he better not hire him because he would just probably make trouble at the terminal" (Trans. No. 1 at p. 133). The jury could well have concluded from this statement that Cooper-Jarrett had contacted Matlack in an effort to deny the plaintiff employment.

[4] The defendant argues that the statement was irrelevant and inadmissible because Clark did not mention Wilson Freight Company and, therefore, there is no basis for inference of an illicit conspiracy involving Wilson. The facts of this case are similar to those in Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957), a civil action under the Sherman Act in which the plaintiff settled with certain defendants prior to trial and proceeded against the remaining defendant which allegedly joined an existing conspiracy. The Ninth Circuit noted that the plaintiff had to establish both the prior existence of the conspiracy and the remaining defendant's subsequent connection with it before evidence of the acts or statements of alleged co-

conspirators would be admissible against the defendant. We agree with that Court that the trial Court has broad discretion in the admission of evidence which tends to establish conspiracy and that the order of proof may be governed by the "rule of convenience" 246 F.2d at 377-79. It is clear that the plaintiff introduced this statement by Clark to show the existence of an on-going conspiracy involving Cooper-Jarrett and Matlack. When coupled with statements of Claire Umberger, which we have held to be admissible as admissions by Wilson, the plaintiff has produced sufficient evidence for the jury to find that Wilson joined an existing conspiracy to blacklist the plaintiff.

[5] The defendant also argues that Clark's statement introduced through Stanrajh was inadmissible hearsay because it did not fall within the co-conspirator exception to the hearsay rule. In Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the Supreme Court stated that under the co-conspirator doctrine the declarations of one conspirator in furtherance of the objects of the conspiracy made to a third party are admissible against his co-conspirators. The Court noted, however, that such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. 315 U.S. at 74, 62 S.Ct. at 467, 86 L.Ed. at 701. *See also* Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc., 375 F.Supp. 610, 624 (E.D. Pa. 1974). The purpose for the rule requiring independent evidence of a conspiracy is to prevent otherwise inad-

missible hearsay to lift itself by its own bootstraps to the level of competent evidence merely by implicating the objecting party as a co-conspirator. We find, however, that the statements by Frankel of Cooper-Jarrett and Umberger of Wilson, which are admissible under other exceptions to the hearsay rule, provide sufficient proof aliunde that a conspiracy existed to permit Clark's statement to be admissible under the co-conspirator exception.

In the light of the foregoing, the Court holds that there was sufficient evidence if believed by the jury, to fasten liability upon defendant Wilson.[2]

As to liability generally, it is the opinion of the Court that such conduct as was found by the jury to exist does violate the antitrust laws. *See* Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967); Blalock v. Ladies Professional Golf Association, 359 F.Supp. 1260 (N.D.Ga.1973). It was there pointed out that the little man is as much entitled to be protected from violation of the antitrust laws as is the large business entity.

B. *Motion for Reduction of Judgment*

Defendant Wilson Freight Company also presents a Motion for Reduction of Judgment based on the fact that

[2] In this opinion, the Court has not discussed the argument that the blacklisting or boycotting of an individual truck driver by a group of trucking companies does not constitute a violation of the antitrust laws. This question was dealt with in extenso in the opinion and order dated August 20, 1974, following the first trial and to which reference is made for a complete dissertation on this point which was not pressed by Wilson in its argument on the present *NOV* motion.

its alleged co-conspirators—Cooper-Jarrett, Inc. and Matlack, Inc.—have made certain payments in settlement of claims against them in this action. Prior to plaintiff's opening statement in the October 9, 1974 trial, the plaintiff agreed to accept $32,500 from Cooper-Jarrett and $27,500 from Matlack in return for granting those two defendants a joint-tortfeasor release from the antitrust claim. Wilson argues that since the plaintiff is not entitled to recover twice for the same damages, this $60,000 settlement amount must be deducted in full from the $75,000 judgment against Wilson. The plaintiff, however, contends that in making the settlement agreement with Cooper-Jarrett and Matlack, he expressly reserved all his rights against Wilson, the remaining defendant, and no reduction should be made. He argues that the jury's verdict represents damages found only against Wilson and, therefore, there will be no double recovery requiring any reduction of the $75,000 judgment.

The question of what amount, if any, of the prior settlement must be set off against plaintiff's judgment against Wilson is governed by Zenith Radio Corporation v. Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). In this case, Hazeltine Research, Inc. sued Zenith Radio Corporation for patent infringement, and Zenith filed a counterclaim alleging that Hazeltine violated the federal antitrust laws by participating in patent pools in Canada, Great Britain, and Australia. As one defense Hazeltine argued that it was protected from liability by a release executed by Zenith in settlement of a prior antitrust action against other co-conspirators in the Canadian patent pool, even though Hazeltine was neither a party to that prior action nor a party to the release. The

Supreme Court held that the effect of a release upon co-conspirators shall be determined in accordance with the intentions of the parties, and it was clear that the parties did not intend Hazeltine to benefit from the release in question. 401 U.S. at 345-48, 91 S.Ct. at 809, 28 L.Ed.2d at 96-97. The Court stated, however, that entirely apart from any release, Hazeltine might have available a defense of payment arising from the prior settlement because a plaintiff who has recovered any item of damages from one co-conspirator may not again recover the same item from another co-conspirator. 401 U.S. at 348, 91 S.Ct. at 811, 28 L.Ed.2d at 97. *See also* Wainwright v. Kraftco Corporation, 58 F.R.D. 9, 11-12 (N.D. Ga.1973).

[6,7] Likewise, in the present case Wilson cannot claim that it was covered by the joint-tortfeasor release because the plaintiff expressly reserved all his rights against Wilson (Trans. No. 1 at page 5). According to *Zenith*, however, the remaining defendant is entitled to a defense of payment to the extent that the $60,000 settlement with Cooper-Jarrett and Matlack covers items of damages included in the $75,000 judgment against Wilson. The problem, therefore, is to determine the overlap between the settlement amount and the judgment against Wilson.[3]

---

[3] We should note at this point that Wilson is not presenting a claim for contribution against its two alleged co-conspirators. In fact, this antitrust action is governed by federal common law under which there is no right of contribution for intentional torts. See Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960); Sabre Shipping Corp. v.

(Footnote continued on following page)

Wilson argues that the $60,000 settlement amount should be deducted in full from the $75,000 judgment, citing *Essaness Theatres Corporation v. Balaban & Katz Corporation*, Trade Reg.Rep. (1955 Trade Cases) ¶ 68,152, at 70,735 (N.D.Ill.1955). In *Essaness Theatres* the plaintiff brought a civil antitrust action against numerous defendants alleging a conspiracy to establish minimum admission prices at Chicago movie theaters, but because the statute of limitations had been tolled for most but not all of the defendants, the damage period was considerably shorter for two of the joint defendants. The district Court stated that because joint tortfeasors are jointly and severably liable, there can be no apportionment of damages between them. The Court concluded that since a judgment against joint tortfeasors must be entered in a single sum against all defendants, it follows that there must be a damage period common to all. The Court, therefore, held that if the plaintiff wished to hold in the two defendants for whom the statute of limitations had not been tolled, the damage period for all defendants would be limited to the shorter period applying to these two defendants.

(Footnote continued from preceding page)

American President Lines, Ltd., 298 F.Supp. 1339, 1343-46 (S.D.N.Y.1969). Unlike the federal securities laws the Sherman Act contains no provisions by which Congress has legislated an exception to this common law rule. See Sabre Shipping Corp., *supra* at 1345; 15 U.S.C. §77k(f); 15 U.S.C. § 78i(e); 15 U.S.C. § 78r(b).

[8] Wilson argues that under *Essaness Theatres,* the damage period as to Cooper-Jarrett and Matlack in the present case would have been restricted to the time from which Wilson joined the existing conspiracy and, therefore, the settlement amount covers only those items of damages which provided the basis for the judgment against Wilson. This analysis would require the full settlement amount to be deducted from plaintiff's judgment. We decline, however, to apply the reasoning of *Essaness Theatres* to the present case. Unlike that case in which a judgment might have been entered against more than one defendant, the plaintiff in our case has obtained a judgment against a single defendant, Wilson Freight Company. The district Court's concern in *Essaness Theatres*—that under Illinois law, separate executions in different amounts may not issue against joint tortfeasors who are bound by the same judgment—does not exist in the present case. Moreover, if Cooper-Jarrett and Matlack had elected to proceed to trial, it is not clear that their liability would have been limited to the period after Wilson had joined the conspiracy. The general rule appears to be that one who joins an on-going conspiracy is equally culpable with the original members and is responsible for all that has previously been done pursuant to the conspiracy. *See, e. g.,* United States v. Lester, 282 F.2d 750 (3d Cir. 1960), *cert. denied,* 364 U.S. 937, 81 S.Ct. 385, 5 L.Ed.2d 368 (1961); Lefco v. United States, 74 F.2d 66 (3d Cir. 1934); Ratner v. Scientific Resources Corp., 53 F.R.D. 325 (S.D.Fla.1971), *appeal dismissed,* 462 F.2d 616 (5th Cir. 1972); Rubenstein v. Columbia Pictures Corp., 154 F.Supp. 216 (D.Minn.1957); Walder v. Paramount Publix Corp., 132 F.Supp. 912 (S.D.N.Y.1955); 16

Am.Jur.2d, Conspiracy § 15 (1964). Wilson, therefore, may have been jointly liable for damages caused by the other two conspirators prior to its own entry into the existing conspiracy.

We find, however, that the settlement amount paid by Cooper-Jarrett and Matlack did include items of damages which were not part of the judgment against Wilson and, therefore, the defendant is not entitled to a deduction of the full settlement amount. At the close of all the evidence in the case, counsel met with the Court in chambers to discuss the charge to the jury. With respect to the proper measure of damages, the defendant suggested that Wilson would be liable only for damages arising after it joined the conspiracy, rather than from the inception of the conspiracy, *and the plaintiff agreed to that instruction* (Trans. No. 2 at p. 399). Accordingly, the Court charged that if Wilson were found to have joined a conspiracy to blacklist the plaintiff, Wilson would be liable only for damages from the date on which it entered the conspiracy—August 24, 1971, the date when the plaintiff filed his application for employment (Trans. No. 1 at p. 329). In this it may well be that Wilson got a better instruction than it was entitled to. Neither party, however, made timely objection to this instruction requested by Wilson and under Rule 51 of the Federal Rules of Civil Procedure, it may not now be assigned as error.

While the judgment against Wilson includes damages incurred only after August 24, 1971, the $60,000 settlement includes items of damages which arose before that date as well as after. The evidence in this case tended to

show that Cooper-Jarrett had recruited Matlack in its efforts to blacklist the plaintiff prior to the time that Wilson joined the conspiracy. The *Zenith* rule prohibiting double recovery by a plaintiff, therefore, does not require the whole settlement amount to be deducted from the judgment. Only that portion of the settlement amount which covers items of damages arising after August 24, 1971 must be deducted from the judgment pursuant to the *Zenith* rule.

[9] The first step in arriving at the appropriate portion of the settlement amount to be deducted from the judgment is to determine the total damages suffered by the plaintiff as a result of the conspiracy. Pursuant to the Court's instructions, the jury found that the plaintiff incurred $25,000 in damages subsequent to August 24, 1971. We must, therefore, determine the amount of damages arising during the period between the inception of the conspiracy and August 24, 1971. Although Cooper-Jarrett may have intended to enlist other trucking companies to blacklist the plaintiff immediately after firing him on October 23, 1970, a conspiracy requires two or more parties. *See* Nelson Radio & Supply Co. v. Motorola, 200 F. 2d 911 (5th Cir. 1952), *cert. denied,* 345 U.S. 925, 73 S.Ct. 783, 97 L.Ed. 1356 (1953). Evidence in the record tends to show that the earliest date on which a conspiracy was in existence was February 1971, when the plaintiff applied for work at Matlack, but was turned down because "the word was out from Cooper-Jarrett" (Trans. No. 1 at p. 133; Trans. No. 2 at pp. 120, 222).

During the course of the trial both parties spent a considerable amount of time in an effort to show the proper measure of plaintiff's damages. The Court permitted the plaintiff to introduce evidence of past earnings as an indication of what he might have earned if he had not been the target of the alleged conspiracy, and the defendant conducted an extensive cross-examination as to these earnings and introduced evidence to mitigate the claimed damages. This evidence provides a sufficient basis for the Court to determine damages arising between February 1971 and August 24, 1971—a period of about six months. Damages in a case such as this are seldom capable of precise determination, but the best evidence in the record of plaintiff's lost earnings between February 1971 and August 24, 1971 can be derived from the 1971 Wage and Tax Statement (Form W-2) of Richard Conley, another Cooper-Jarrett over-the-road truck driver with less seniority than the plaintiff, which was admitted into evidence as Plaintiff's Exhibit 11 (Trans. No. 1 at p. 127). This Form W-2 shows that Conley earned $17,963.24 during 1971 which is approximately $1500 per month. Applying this measure of damages to the plaintiff, plaintiff's lost earnings would equal $9,000 over the six-month period in question.

In mitigation of these damages, we must subtract any wages earned by the plaintiff between February 1971 and August 24, 1971. The plaintiff testified that after being fired by Cooper-Jarrett on October 23, 1970, the first employment he found was with International Cold Storage Co. (Trans. No. 1 at pp. 62-63). The evidence further

shows that the plaintiff worked for International Cold Storage from April 14, 1971 to December 6, 1971—a period of about eight months (Trans. No. 1 at p. 88). Plaintiff's 1971 Individual Income Tax Return, admitted into evidence as Defendant's Exhibit D, reveals that the plaintiff earned $7,588.98 while working for International Cold Storage which is approximately $950 per month. During the period between February 1971 and August 24, 1971, the plaintiff worked approximately four months for International Cold Storage earning some $3800. When we subtract this amount from plaintiff's lost earnings of $9000, we arrive at net damages of $5200 for the period between the inception of the conspiracy and August 24, 1971. By adding this $5200 amount to the $25,000 damage figure which the jury found for the period after August 24, 1971, we conclude that the plaintiff suffered total damages of $30,200 as a result of the conspiracy.

Since the $60,000 payment by Cooper-Jarrett and Matlack was in settlement of all plaintiff's damages arising from the antitrust claim, once total damages are found the next step is to determine the percentage of these total damages which were incurred after August 24, 1971. This approach will give a fair indication of the percentage of the settlement amount which covered the same items providing the basis for the jury's verdict. By dividing the total damages into $25,000, we find that about 83 percent of the total damages were suffered after August 24, 1971, and 83 percent of the settlement amount equals $49,800. This amount constitutes double damages for which Wilson may present the defense of payment according to the

Zenith rule. Under Flintkote Co. v. Lysfjord, 246 F. 2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed.2d 46 (1957), the jury's verdict must be trebled before the appropriate amount of the settlement may be deducted. The judgment against Wilson, therefore, should be reduced from $75,000 to $25,200.

[10-12] In conclusion, the plaintiff may recover only once for the same items of damages. Since the jury's verdict was based only on damages incurred after August 24, 1971, while the settlement amount covered damages suffered both before and after that date, Wilson is entitled to a deduction of only that portion of the settlement which covered damages after August 24, 1971. The plaintiff's argument that the jury found damages only against Wilson and that none of the settlement amount paid by its alleged co-conspirators may be deducted is not convincing. A conspiracy in violation of the Sherman Act requires two or more parties who become jointly and severably liable for the resulting damages. By finding for the plaintiff in this antitrust case, the jury by implication found that Wilson was not the only culpable party. An amount paid in settlement by one conspirator, therefore, may provide a defense of payment for a co-conspirator under the *Zenith* rule if it covers the same items of damages.